

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEFF HAWKINS,
CDCR #F-18885,

Plaintiff,

vs.

MARCUS POLLARD, Warden; B.D
PHILLIPS, Associate Warden; D. LEWIS,
Associate Warden; GARCIA, Facility
Captain,

Defendants.

Case No.: 3:21-cv-01328-DMS-JLB

ORDER:

**1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
[ECF No. 2]**

AND

**2) DIRECTING U.S. MARSHAL TO
EFFECT SERVICE PURSUANT
TO 28 U.S.C. § 1915(d) AND
Fed. R. Civ. P. 4(c)(3)**

Jeff Hawkins (“Plaintiff”), currently incarcerated at R.J. Donovan State Prison (“RJD”), has filed a pro se civil rights action pursuant 42 U.S.C. § 1983. (See ECF No. 1.) Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a) at the time of filing. He has instead filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. §1915(a). (See ECF No. 2.)

///

///

///

1 **I. Motion to Proceed In Forma Pauperis**

2 All parties instituting any civil action, suit or proceeding in a district court of the
3 United States, except an application for writ of habeas corpus, must pay a filing fee of
4 \$402.¹ See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to
5 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
6 Section 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007);
7 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is
8 granted leave to proceed IFP remains obligated to pay the entire fee in “increments” or
9 “installments,” *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775
10 F.3d 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately
11 dismissed. See 28 U.S.C. § 1915(b)(1), (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th
12 Cir. 2002).

13 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
14 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the
15 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
16 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
17 trust account statement, the Court assesses an initial payment of 20% of (a) the average
18 monthly deposits in the account for the past six months, or (b) the average monthly balance
19 in the account for the past six months, whichever is greater, unless the prisoner has no
20 assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody
21 of the prisoner then collects subsequent payments, assessed at 20% of the preceding
22 month’s income, in any month in which his account exceeds \$10, and forwards those
23
24

25
26
27
28 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative
fee of \$52. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court
Misc. Fee Schedule, § 14 (eff. Dec. 1, 2020)). The additional \$52 administrative fee does
not apply to persons granted leave to proceed IFP. *Id.*

1 payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*,
2 136 S. Ct. at 629.

3 In support of Plaintiff’s IFP Motion, a prison certificate and a certified copy of
4 Plaintiff’s certified inmate trust account statement has been supplied by RJD accounting
5 officials. (*See* ECF No. 3 at 1-3.) These documents show that Plaintiff carried an average
6 monthly balance of \$465.67 and had \$233.34 in average monthly deposits to his trust
7 account for the six months immediately preceding filing the Complaint, and that Plaintiff
8 had an available balance of \$410.10 at the time of filing. (*See id.*)

9 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 2), and
10 assesses an initial partial filing fee of \$93.13 pursuant to 28 U.S.C. Section 1915(b)(1)(A).
11 The Court directs the Secretary of the CDCR, or her designee, to collect this initial filing
12 fee only if sufficient funds are available in Plaintiff’s account at the time this Order is
13 executed. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be
14 prohibited from bringing a civil action or appealing a civil action or criminal judgment for
15 the reason that the prisoner has no assets and no means by which to pay the initial partial
16 filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.
17 Section 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case
18 based solely on a “failure to pay . . . due to the lack of funds available to him when payment
19 is ordered.”). The Court further directs the Secretary of the CDCR, or her designee, to
20 collect the remaining balance of the filing fees required by 28 U.S.C. Section 1914 and to
21 forward it to the Clerk of the Court pursuant to the installment payment provisions set forth
22 in 28 U.S.C. Section 1915(b)(1).

23 **III. Sua Sponte Screening pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b)**

24 A. Standard of Review

25 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint also requires a
26 pre-answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these
27 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of it,
28 which is frivolous, malicious, fails to state a claim, or seeks damages from defendants who

1 are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
2 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.
3 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that
4 the targets of frivolous or malicious suits need not bear the expense of responding.’”
5 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*
6 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

7 “The standard for determining whether a plaintiff has failed to state a claim upon
8 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
9 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d
10 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.
11 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
12 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
13 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted
14 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
15 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

16 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
17 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
18 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for relief
19 [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
20 experience and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned,
21 the defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility
22 standard. *Id.*; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

23 B. 42 U.S.C. § 1983

24 “Section 1983 creates a private right of action against individuals who, acting under
25 color of state law, violate federal constitutional or statutory rights.” *Devereaux v. Abbey*,
26 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of substantive
27 rights, but merely provides a method for vindicating federal rights elsewhere conferred.”
28 *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks and citations

1 omitted). “To establish § 1983 liability, a Plaintiff must show both (1) deprivation of a right
2 secured by the Constitution and laws of the United States, and (2) that the deprivation was
3 committed by a person acting under color of state law.” *Tsao v. Desert Palace, Inc.*, 698
4 F.3d 1128, 1138 (9th Cir. 2012).

5 C. Discussion

6 Plaintiff claims Defendants have violated his Eighth Amendment rights by failing to
7 protect him from contracting Covid-19 while in prison. (*See* Compl. at 3.) Plaintiff alleges
8 he suffers from asthma and “chronic pulmonary lung disease” which could put him at
9 increased risk of serious disease or death if he contracts Covid-19. (*Id.*) Plaintiff alleges
10 that Defendants provided masks of “poor quality,” placed “infected Covid-19 inmates in
11 the same housing unit,” and failed to adequately train staff to wear their face masks
12 properly. (*Id.*) As a result, Plaintiff was “infected with Covid-19” which caused him to
13 suffer from chest pain, “bone aches,” digestive issues, and a loss of sense of smell or taste.
14 (*Id.*) Plaintiff also claims he received “no medical attention whatsoever.” (*Id.*)

15 The Eighth Amendment prohibits the infliction of “cruel and unusual punishments.”
16 U.S. Const. Amend. VIII. In order to state a plausible Eighth Amendment claim for relief,
17 a Plaintiff must allege facts sufficient to show that Defendants acted with “deliberate
18 indifference.” *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1068 (9th Cir. 2016); *Iqbal*,
19 556 U.S. at 678. “A prison official acts with ‘deliberate indifference . . . only if the [prison
20 official] knows of and disregards an excessive risk to inmate health and safety.’” *Toguchi*
21 *v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (quoting *Gibson v. Cnty. of Washoe*, 290
22 F.3d 1175, 1187 (9th Cir. 2002), *overruled on other grounds by Castro*, 833 F.3d at 1076.
23 “Under this standard, the prison official must not only ‘be aware of facts from which the
24 inference could be drawn that a substantial risk of serious harm exists,’ but that person
25 ‘must also draw the inference.’” *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 837
26 (1994)). Prison officials have a duty to protect inmates from communicable diseases. *See*
27 *e.g.*, *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (finding prison officials may not “be
28 deliberately indifferent to the exposure of inmates to a serious, communicable disease”);

1 *Hutto v. Finney*, 437 U.S. 678, 682-83 (1978) (affirming a finding of an Eighth Amendment
2 violation where a facility housed individuals in crowded cells with others suffering from
3 infectious diseases, such as Hepatitis and venereal disease, and the individuals’ “mattresses
4 were removed and jumbled together each morning, then returned to the cells at random in
5 the evening”); *Cervantes*, 493 F.3d at 1050 (recognizing a cause of action under the Eighth
6 Amendment and 42 U.S.C. § 1983 for an alleged policy of not screening inmates for
7 infectious diseases—HIV, Hepatitis C, and *Helicobacter pylori*—and for housing
8 contagious and healthy individuals together during a known “epidemic of hepatitis C”);
9 *Maney v. Hall*, ___ F. Supp. 2d ___, 2021 WL 354384, at *12 (D. Or. Feb. 2, 2021) (citing
10 cases recognizing prison officials’ duty to protect inmates from exposure to communicable
11 diseases under the Eighth Amendment). Accordingly, the Court concludes that Plaintiff
12 has stated a plausible Eighth Amendment claim sufficient to meet the screening standard
13 against the Defendants for failing to protect him against exposure to Covid-19. *Iqbal*, 556
14 U.S. at 678.

15 **IV. Conclusion and Orders**

16 Based on the foregoing, the Court:

- 17 1. **GRANTS** Plaintiff’s Motion to Proceed In Forma Pauperis (ECF No. 2).
- 18 2. **ORDERS** the Secretary of the CDCR, or her designee, to collect from
19 Plaintiff’s prison trust account the \$350 filing fee owed in this case by collecting monthly
20 payments from the account in an amount equal to twenty percent (20%) of the preceding
21 month’s income and forward payments to the Clerk of the Court each time the amount in
22 the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS**
23 **MUST BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO**
24 **THIS ACTION.**
- 25 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order by U.S. Mail
26 on Kathleen Allison, Secretary, California Department of Corrections and Rehabilitation,
27 P.O. Box 942883, Sacramento, California, 94283-0001.

1 4. **DIRECTS** the Clerk to issue a summons as to Plaintiff’s Complaint (ECF No.
2 1) upon Defendants MARCUS POLLARD, B.D PHILLIPS, D. LEWIS, and GARCIA,
3 and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each of these
4 Defendants. In addition, the Clerk will provide Plaintiff with certified copies of this Order,
5 certified copies of his Complaint (ECF No. 1), and the summons so that he may serve the
6 Defendants. Upon receipt of this “IFP Package,” Plaintiff must complete the USM Form
7 285s as completely and accurately as possible, include an address where each Defendant
8 may be found and/or subject to service pursuant to S.D. Cal. CivLR 4.1c., and return them
9 to the United States Marshal according to the instructions the Clerk provides in the letter
10 accompanying his IFP package.

11 5. **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons
12 upon Defendants upon receipt and as directed by Plaintiff on the completed USM Form
13 285s, and to promptly file proof of service, or proof of any attempt at service unable to be
14 executed, with the Clerk of Court. *See* S.D. Cal. CivLR 5.2. All costs of that service will
15 be advanced by the United States. *See* 28 U.S.C. § 1915(d); Fed. R. Civ. P. 4(c)(3).

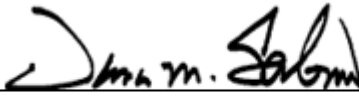
16 6. **ORDERS** Defendants, once they have been served, to reply to Plaintiff’s
17 Complaint within the time provided by the applicable provisions of Federal Rule of Civil
18 Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be
19 permitted to “waive the right to reply to any action brought by a prisoner confined in any
20 jail, prison, or other correctional facility under section 1983,” once the Court has conducted
21 its sua sponte screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has
22 made a preliminary determination based on the face on the pleading alone that Plaintiff has
23 a “reasonable opportunity to prevail on the merits,” defendant is required to respond).

24 7. **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to
25 serve upon Defendants, or if appearance has been entered by counsel, upon Defendant’s
26 counsel, a copy of every further pleading, motion, or other document submitted for the
27 Court’s consideration pursuant to Fed. R. Civ. P. 5(b). Plaintiff must include with every
28 original document he seeks to file with the Clerk of the Court, a certificate stating the

1 manner in which a true and correct copy of that document has been served on Defendants
2 or their counsel, and the date of that service. *See* S.D. Cal. CivLR 5.2. Any document
3 received by the Court which has not been properly filed with the Clerk or which fails to
4 include a Certificate of Service upon the Defendants, or their counsel, may be disregarded.

5 **IT IS SO ORDERED.**

6 Dated: July 30, 2021

7 
8 _____
9 Hon. Dana M. Sabraw, Chief Judge
10 United States District Court
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28